HOH KIANG NGAN & ORS A

v.

HOH HAN KEYET

COURT OF APPEAL, PUTRAJAYA B
RAUS SHARIF PCA
ALIZATUL KHAIR OSMAN JCA
MAH WENG KWAI JCA
[CIVIL APPEAL NO: W-02(NCC)A-1485-06-2012]
15 MARCH 2013 C

CIVIL PROCEDURE: *Parties - Non-joinder - Dispute pertaining to settlement agreement - Whether all parties to settlement agreement must necessarily be cited as parties*

COMPANY LAW: *Directors - Election of - Contractual provision regarding election of director - Dispute between shareholders of family company settled by way of settlement agreement - Agreement providing for each male descendant to be represented in board of directors - Whether members may be compelled to vote in accordance with agreement* D E

COMPANY LAW: *Directors - Place of residence - Company to have at least two directors having their principal or only place of residence in Malaysia - Whether requirements complied with - Companies Act 1965 s. 122(1), (6)* F

COMPANY LAW: *Family company - Directors - Contractual provision regarding election of director - Dispute between shareholders of family company settled by way of settlement agreement - Agreement providing for each male descendant to be represented in board of directors - Whether members may be compelled to vote in accordance with agreement* G

CONTRACT: *Settlement - Settlement agreement - Breach of - Dispute between shareholders of family company settled by way of settlement agreement - Agreement providing for each male descendant to be represented in board of directors - Whether refusal to appoint representative of a particular male descendant amounted to breach of agreement* H

CONTRACT: *Terms - Interpretation - Execution of contract - Whether court entitled to look at history or background facts leading to execution of contract* I

A This appeal revolved around a patriarch, the late Hoh Ying Chye, his descendants and the family company known as Sharikat Ying Mui Sdn Bhd ('the company'). The Articles of Association of the company ('AA') stipulated that the membership of the company shall be restricted to the natural male descendants of the members
B of the company. The direct male descendants of Hoh Ying Chye were Frank Hoh, Richard Hoh, Derek Hoh, George Hoh and Robert Hoh (deceased). Disputes arose between the shareholders with allegations that one of the five branches of the family was being sidelined from the management of the company's affairs. This
C led to the commencement of legal proceedings. To resolve the dispute and the pending legal proceedings, the shareholders entered into a settlement agreement ('the agreement'). Clause 1.9 of the agreement provided that each branch of the late Hoh Ying Chye's direct descendants shall be eligible to have one male
D member thereof elected as a director of the company; and that since Derek Hoh and Richard Hoh were not represented on the board of directors, their eligible male descendants shall be appointed as directors of the company within one month. Following the execution of the agreement, an Annual General
E Meeting ('AGM') of the company was held. However, at the AGM, all the appellants save for Frank Hoh voted against the proposal to re-elect the respondent as a director of the company. The respondent filed an action in the High Court for *inter alia*, a declaration that he, being the only male member of the late Robert
F Hoh's family, was the eligible nominee to be elected as a director of the company to represent the Robert Hoh's branch of the family, in accordance with cl. 1.9 of the agreement and in accordance with the AA. The learned judge allowed the respondent's application and ordered that a fresh general meeting
G of the company be convened where each of the appellants shall vote in favour of the re-election of the respondent as a director of the company. Consequently, a fresh general meeting of the company was held and the respondent was re-elected as a director. The appellants appealed against the whole of the said
H decision. The issues that arose to be determined on appeal were: (i) whether the learned judge had construed cl. 1.9 of the agreement correctly; (ii) whether the learned judge was correct in granting the order when not all parties to the agreement were cited as defendants in the action; and (iii) whether with the

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removal of the respondent as a director, the company was in breach of s. 122(1) of the Companies Act 1965 ('CA65') in that the company did not have at least two directors who each had his principal or only place of residence in Malaysia.

Held (dismissing the appeal with costs)
Per Mah Weng Kwai JCA delivering the judgment of the court:

(1) Clause 1.9 could not be construed as a mere "eligibility clause" as the eligibility criteria for the election of directors of the company was set out in the AA. To give effect and meaning to cl. 1.9 the respondent "must" be elected or in other words "appointed" as a director of the company. Clause 1.9 did not say that the right was only limited to a right to "stand for election". It expressly provided that each branch of the family "shall be eligible" to have one representative "elected as a director". (paras 18 & 19)

(2) To arrive at a correct interpretation of any provision in a contract, which will be fair and just, a court is entitled to consider the history or background facts leading to the execution of the contract. Given the background scenario that led to the execution of the agreement, it would have been highly unlikely that the objective of cl. 1.9 was merely to provide for the eligibility requirement. The primary purpose of cl. 1.9 was to ensure that each of the five branches of the family would be represented on the board of directors thereby settling the family dispute and the pending legal proceedings (*Bon Chong Hing & Anor v. Gama Trading Company (Hong Kong) Ltd;* refd). (paras 22, 23 & 26)

(3) The respondent did not have to add the other shareholders as defendants as they did not breach the terms of the agreement. At the AGM, George Hoh and Maureen Hoh voted in favour of the re-election of the respondent as a director. Hoh Han Lyam was absent at the AGM and did not vote and Rohanderan Holdings Sdn Bhd was no longer a shareholder of the company. Hence, the respondent did not have a cause of action against any of these four shareholders. Pursuant to s. 41 of the Specific Relief Act 1950, the respondent could not have commenced a suit against these shareholders as they did not "deny" the respondent of his right to be re-elected. (paras 30 & 31)

(4) Jonathan Hoh and Leonard Hoh, the directors nominated and elected to represent the family branches of Derek Hoh and Richard Hoh respectively, did not reside in Malaysia. George Hoh had his principal residence in Malaysia. Frank Hoh's principal place of residence was in Australia. Consequently, the company was in breach of s. 122(1) of the CA65. Hence, the resolutions passed at the AGM were null and void and that pursuant to s. 122(6) of the CA65, the removal of the respondent as a director was invalid. (para 33)

Bahasa Malaysia *Translation Of Headnotes*

Rayuan ini berkisar kebapaan, mendiang Hoh Ying Chye, keturunannya dan syarikat keluarga yang dikenali sebagai Sharikat Ying Mui Sdn Bhd ('syarikat tersebut'). Perkara-Perkara Persatuan syarikat tersebut ('Perkara-Perkara Persatuan') menyatakan bahawa keahlian syarikat adalah terhad kepada keturunan lelaki yang asli ahli-ahli syarikat tersebut. Ahli lelaki keturunan langsung Hoh Ying Chye adalah Frank Hoh, Richard Hoh, Derek Hoh, George Hoh and Robert Hoh (si mati). Pertikaian timbul antara pemegang-pemegang saham dengan dakwaan bahawa salah satu daripada lima cabang keluarga tersebut telah dipinggirkan daripada pentadbiran urusan syarikat tersebut. Ini menjurus kepada permulaan prosiding undang-undang. Untuk menyelesaikan pertikaian dan prosiding undang-undang yang ada, pemegang-pemegang saham memasuki satu perjanjian penyelesaian ('perjanjian tersebut'). Klausa 1.9 perjanjian tersebut memperuntukkan bahawa setiap cabang keturunan langsung mendiang Hoh Ying Chye layak mempunyai seorang ahli lelaki dipilih sebagai pengarah syarikat tersebut; dan oleh sebab Derek Hoh dan Richard Hoh tidak diwakili dalam lembaga pengarah, keturunan lelaki mereka yang layak mesti dilantik sebagai pengarah syarikat dalam tempoh satu bulan. Berikutan pemeteraian perjanjian tersebut, satu Mesyuarat Agung Tahunan ('MAT') syarikat tersebut diadakan. Walau bagaimanapun, dalam MAT tersebut, kesemua perayu kecuali Frank Hoh mengundi menentang cadangan memilih semula responden sebagai pengarah syarikat tersebut. Responden memfailkan tindakan di Mahkamah Tinggi antara lain, untuk deklarasi bahawa dia, sebagai satu-satunya ahli lelaki keluarga mendiang Robert Hoh, adalah calon yang layak dipilih sebagai pengarah syarikat tersebut untuk mewakili cabang keluarga Robert Hoh, menurut kl. 1.9 perjanjian tersebut dan menurut Perkara-Perkara Persatuan. Yang arif hakim

membenarkan permohonan responden dan mengarahkan mesyuarat agung yang baru syarikat tersebut dijalankan di mana setiap perayu mesti mengundi memihak kepada pemilihan semula responden sebagai pengarah syarikat tersebut. Dengan itu, satu mesyuarat agung syarikat tersebut dijalankan dan responden dipilih semula sebagai pengarah. Perayu-perayu merayu terhadap keseluruhan keputusan tersebut. Isu-isu yang berbangkit untuk pertimbangan dalam rayuan adalah: (i) sama ada yang arif hakim telah mentafsirkan kl. 1.9 perjanjian tersebut dengan betul; (ii) sama ada yang arif hakim betul dalam membenarkan perintah apabila bukan semua pihak kepada perjanjian tersebut dinamakan sebagai defendan dalam tindakan tersebut; dan (iii) sama ada dengan penyingkiran responden sebagai pengarah, syarikat tersebut melanggar s. 122 Akta Syarikat 1965 ('Akta 1965') di mana syarikat tersebut tidak mempunyai sekurang-kurangnya dua pengarah yang setiap seorang mempunyai tempat bermastautin utama atau satu-satunya tempat bermastautin di Malaysia.

Diputuskan (menolak rayuan dengan kos)
Oleh Mah Weng Kwai HMR menyampaikan penghakiman mahkamah:

(1) Klausa 1.9 tidak boleh ditafsirkan semata-mata sebagai "klausa kelayakan" kerana kriteria kelayakan untuk pemilihan pengarah syarikat tersebut telah dibentangkan dalam Perkara-Perkara Persatuan. Untuk memberikan kesan dan maksud kepada kl. 1.9 responden "mesti" dipilih atau dalam perkataan lain "dilantik" sebagai pengarah syarikat tersebut. Klausa 1.9 tidak menyatakan bahawa hak tersebut hanyalah terhad kepada hak untuk "bertanding". Ia secara langsung memperuntukkan bahawa setiap cabang keluarga tersebut "mestilah layak" untuk mempunyai seorang wakil "dipilih sebagai pengarah".

(2) Untuk mencapai tafsiran yang betul mana-mana peruntukan dalam kontrak, yang adil dan saksama, mahkamah berhak untuk mempertimbangkan sejarah atau latar belakang fakta yang menjurus kepada pemeteraian kontrak tersebut. Berdasarkan kepada senario latar belakang yang membawa kepada pemeteraian perjanjian tersebut adalah amat tidak berkemungkinan bahawa objektif kl. 1.9 adalah semata-mata untuk memperuntukkan keperluan bagi kelayakan. Tujuan utama kl. 1.9 adalah untuk memastikan bahawa setiap daripada

A lima cabang keluarga tersebut akan diwakili dalam lembaga pengarah, dengan itu menyelesaikan pertikaian keluarga tersebut dan prosiding undang-undang *(Bon Chong Hing & Anor v. Gama Trading Company (Hong Kong) Ltd;* dirujuk).

B **(3)** Responden tidak perlu menambah pemegang saham yang lain sebagai defendan kerana mereka tidak melanggar terma-terma perjanjian tersebut. Dalam MAT, George Hoh dan Maureen Hoh mengundi memihak kepada pemilihan semula responden sebagai pengarah. Hoh Han Lyam tidak hadir dalam MAT dan
C tidak mengundi dan Rohanderan Holdings Sdn Bhd bukan lagi pemegang saham syarikat tersebut. Dengan itu, responden tidak mempunyai kausa tindakan terhadap mana-mana daripada empat pemegang saham ini. Berikutan s. 41 Akta Relief Spesifik 1950, responden tidak boleh memulakan guaman
D terhadap pemegang-pemegang saham ini kerana mereka tidak "menafikan" responden hak untuk dipilih semula.

(4) Jonathan Hoh dan Leonard Hoh, pengarah-pengarah yang dicalonkan dan dipilih untuk masing-masing mewakili cabang
E keluarga Derek Hoh dan Richard Hoh, tidak bermastautin di Malaysia. George Hoh mempunyai tempat bermastautin di Malaysia. Tempat bermastautin utama Frank Hoh adalah Australia. Dengan itu, syarikat melanggar s. 122(1) Akta. Maka, resolusi yang diluluskan dalam MAT adalah batal dan
F tidak sah dan berikutan s. 122(6) Akta penyingkiran responden sebagai pengarah adalah tidak sah.

Case(s) referred to:

Antaios Compania Naviera SA v. Salen Rederierna AB [1985] AC 191 ***(refd)***

G *Bon Chong Hing & Anor v. Gama Trading Company (Hong Kong) Ltd [2011] 6 CLJ 493 CA* ***(refd)***

City Investment Sdn Bhd v. Koperasi Serbaguna CEUPACS Tanggungan Bhd [1985] 1 CLJ 131; [1985] CLJ (Rep) 77 FC ***(refd)***

In Re Y (Minors) (Adoption: Jurisdiction) [1985] 3 All ER 33 ***(refd)***

Law Land Co Ltd v. Consumers Association [1980] 2 EGLR 109 ***(refd)***

H *Levene v. Commissioner of Inland Revenue [1928] AC 217* ***(refd)***

Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd [1997] AC 749 ***(refd)***

Prenn v. Simmonds [1971] 3 All ER 237 ***(refd)***

Weardale Coal & Iron Co, Ltd v. CW Hodson, AE Hodson [1894] 1 QB
I *598 CA* ***(refd)***

Williams v. Horsham District Council [2004] 3 All ER 30 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 122(1), (6)
Specific Relief Act 1950, ss. 41, 42

For the appellant - Rishwant Singh; M/s Zul Rafique & Partners
For the respondent - Jack Yow; M/s Rahmat Lim & Partners

[Appeal from High Court, Kuala Lumpur, Originating Summons No: 24NCC-245-2011]

Reported by Amutha Suppayah

JUDGMENT

Mah Weng Kwai JCA:

Family History

[1] This appeal revolves around a patriarch, the late Hoh Ying Chye, his descendants and the family company known as Syarikat Ying Mui Sdn Bhd, the 16th appellant ('the company').

[2] Articles 3 and 78 of the Articles of Association of the company, which was incorporated on 5 September 1968, stipulate that the membership of the company shall be restricted to the natural male descendants of the members of the company with the exception of Mdm. Yow Yow Mui and private limited companies which are controlled by the members or their natural male descendants and a director of the company shall be required to hold ordinary shares in the company.

[3] The direct male descendants of Hoh Ying Chye are as follows:

(i) Frank Hoh Kiang Ngan, the 1st appellant;

(ii) Richard Hoh Kiang Seong, the 2nd appellant;

(iii) Derek Hoh Kiang Howe, the 7th appellant;

(iv) George Hoh Kiang Po, the Executive Chairman of the company and shareholder;

(v) Robert Hoh Kiang Chan, deceased.

[4] Disputes arose between the shareholders of the company with allegations that one of the five branches of the family was being sidelined or omitted from the management of the company's affairs. This led to the commencement of legal proceedings.

[5] In order to resolve the family dispute and the pending legal proceedings all the shareholders of the company and the company entered into a settlement agreement on 9 December 2010. The primary purpose of the settlement agreement was to ensure that each branch of Hoh Ying Chye's direct (male) descendants would be equally represented on the Board of Directors of the company to avoid further disputes in particular to ensure that no one branch of the family would be sidelined.

[6] Clause 1.9 of the settlement agreement provides that:

> Each branch of the late Hoh Ying Chye's direct descendants shall be eligible to have one male member thereof elected as a director of the company. To the extent that as at the date of this settlement agreement, Derek Hoh and Richard Hoh are not represented on the board of directors of the company, the parties further agree that they and/or such of their eligible male descendants as they may each nominate shall be appointed as the directors of the company within one month of the withdrawal order.

[7] Following the execution of the settlement agreement, an Annual General Meeting (AGM) of the company (the 42nd) was held on 12 July 2011. On the agenda was the approval of the following proposals by the shareholders of the company namely:

(i) that the respondent, the only natural male descendant and the sole representative of the late Robert Hoh's branch of the family, who holds shares in the company and a retiring director of the company, be re-elected as a director of the company;

(ii) that Jonathan Hoh, the 4th appellant, being the son of Derek Hoh, be elected as a director of the company to represent Derek Hoh's branch of the family; and

(iii) that Leonard Hoh, the 10th appellant being the son of Richard Hoh be elected as a director of the company to represent Richard Hoh's branch of the family.

[8] However, at the AGM all the appellants save for Frank Hoh (the 1st appellant) in his personal capacity, voted against the proposal to re-elect the respondent as a director of the company.

[9] George Hoh and Frank Hoh (the 1st appellant) are the existing directors of the company and both represent their own branch of the family.

[10] On 7 August 2011 the respondent being dissatisfied with his "removal" from the Board of Directors of the company filed an action in the High Court for *inter alia*, a declaration that he, being the only male member of the late Robert Hoh's family who holds ordinary shares in the company, is the only eligible nominee to be elected as a director of the company to represent the Robert Hoh's branch of the family, in accordance with cl. 1.9 of the settlement agreement and in accordance with the company's memorandum and Articles of Association.

[11] On 14 June 2012, upon reading the cause papers and upon hearing the submissions of respective counsel, the learned judge allowed the respondent's application. The court ordered that a fresh general meeting of the company be convened where each of the appellants or their respective proxies shall formally vote in favour of the re-election of the respondent as a director of the company. Consequently, on 1 August 2012 a fresh general meeting of the company was held and the respondent was re-elected as a director of the company.

[12] The appellants being dissatisfied with the order of the learned judge appealed against the whole of the said decision.

Issues To Be Determined On Appeal

[13] The following are the main issues to be determined by the court:

(i) Whether the learned judge had construed and interpreted cl. 1.9 of the settlement agreement correctly;

(ii) Whether the learned judge was correct in granting the order when not all parties to the settlement agreement were cited as defendants in the action; and

(iii) Whether with the removal of the respondent as a director of the company, the company was in breach of s. 122(1) of the Companies Act 1965 in that the company did not have at least two directors who each has his principal or only place of residence in Malaysia.

Grounds Of Decision

[14] Having read the record of appeal and the written submissions of counsel for the appellants and the respondent and upon hearing the oral submissions of counsel aforesaid, the court arrived at the following findings of fact and law.

Issue 1 – Whether The Learned Judge Had Construed And Interpreted cl. 1.9 Of The Settlement Agreement Correctly

[15] Central to this appeal is the interpretation and construction of the provisions of cl. 1.9 of the settlement agreement.

[16] The respondent submitted that the resolution passed by the majority of the shareholders not to re-elect the respondent as a director of the company was a clear violation and breach of cl. 1.9 by the appellants as well as a breach of the respondent's legitimate expectation to be re-elected as a director and to be involved in the management of the company. The legitimate expectation of the respondent was that pursuant to cl. 1.9 he had expected to be re-elected as a director of the company, being the only natural male descendant of Robert Hoh and the only representative of the late Robert Hoh's branch of the family that holds shares in the company.

[17] Counsel for the appellants argued to the contrary that cl. 1.9 was merely an "eligibility clause" and that it was entirely up to the shareholders to decide whom to elect as directors of the company at the AGM. The appellants contended that cl. 1.9 only gives the respondent a right to be eligible to "stand for election" and not a right to "be appointed" as a director of the company. Accordingly the shareholders were not compelled to vote and re-elect the respondent as a director.

[18] The court is of the view that cl. 1.9 cannot be construed as a mere "eligibility clause" as the eligibility criteria for the election of directors of the company is set out in articles 3 and 78 of the Articles of Association of the company to wit, to be eligible to be appointed as a director of the company, the person must be a

natural male descendant of the members of the company and who holds ordinary shares in the company. To give effect and meaning to cl. 1.9 the respondent "must" be elected or in other words "appointed" as a director of the company.

[19] Clause 1.9 does not say that the right is only limited to a right to "stand for election". It expressly provides that each branch of the family "shall be eligible" to have one representative "elected as a director".

[20] The eligibility criteria is also set out in cl. 1.10 of the settlement agreement. Clause 1.10 which stipulates that eligibility shall be governed by the memorandum and Articles of Association, reads as follows:

> The eligibility of any person to be elected as a director of the company shall be governed by the Company's Memorandum and Articles of Association.

[21] The court agrees with counsel for the respondent that if the appellants are correct in their interpretation of cl. 1.9 that it is a mere eligibility clause, then surely there would have been no need to insert cl. 1.10. It must be noted at this juncture that the settlement agreement was drafted by no less than three sets of solicitors acting for the parties who had all mutually agreed to the terms and conditions of the agreement. It would be very surprising indeed, to say the least, if the solicitors had intended to treat cl. 1.9 as a mere eligibility clause in light of arts. 3 and 78 and cl. 1.10 of the settlement agreement. In such a situation cl. 1.9 would clearly be mere surplusage if not redundant altogether. Thus, to give commercial sense and to adopt a purposive approach to the construction of cl. 1.9, the clause must be interpreted differently from cl. 1.10 that is to say, cl. 1.9 provides for each branch of the family to have one representative elected as a director of the company. The word "eligible" in cl. 1.9 must mean "entitled to be elected". The contrary would be true where for example, there is no male descendant in any branch of the family who holds shares in the company. Then there would be no person entitled to be elected onto the board of directors and there would be no representation of that branch of the family on the board. Similarly, in the event the respondent becomes a bankrupt or no longer holds shares in the company he would be rendered ineligible by cl. 1.10 and articles 3 and 78 and would not be "entitled to be elected" or continue as a director, as the case may be.

[22] To arrive at a correct interpretation of any provision in a contract, which will be fair and just, a court is entitled to consider the history or background facts leading to the execution of the contract.

[23] In *Bon Chong Hing & Anor v. Gama Trading Company (Hong Kong) Ltd* [2011] 6 CLJ 493, His Lordship Abdul Malik Ishak JCA delivering the judgment of the Court of Appeal on the construction and interpretation of an agreement adopted the meaning that best serves the commercial purpose of the shareholders' agreement. The learned judge applied the business common sense approach which generally favours a commercially sensible construction. In doing so His Lordship considered a long list of cases including *Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd* [1997] AC 749 per Lord Steyn; *Weardale Coal & Iron Co, Ltd v. CW Hodson, AE Hodson* [1894] 1 QB 598 CA per Lord Esher MR; *Law Land Co Ltd v. Consumers Association* [1980] 2 EGLR 109 per Brightman LJ; *Prenn v. Simmonds* [1971] 3 All ER 237, HL per Lord Wilberforce and *Antaios Compania Naviera SA v. Salen Rederierna AB* [1985] AC 191 HL per Lord Diplock.

[24] Discerning the principles from all the authorities considered His Lordship Abdul Malik Ishak JCA had this to say:

> That the task of interpreting a contract requires an objective approach. And the court must determine the objective aim or purpose of the transaction and this is usually done by taking into account the factual matrix that forms the background to the contract. At the end of the day, the correct test to apply is the test of a reasonable man and this is said to be the stamp of an objective approach as opposed to the subjective view of a party to the contract. Of course, emphasis is always placed on the words used in the contract but where the words used lead to a conclusion that defies business logic, then the contract must be construed in such a way as to make it conform to business logic.

And further in the case of *City Investment Sdn Bhd v. Koperasi Serbaguna CEUPACS Tanggungan Bhd* [1985] 1 CLJ 131; [1985] CLJ (Rep) 77 at p. 82, the Federal Court held that "the general principle of construction of contract applies to all contracts whether they are building contracts or not and in each case the meaning of any clause in a particular contract has to be ascertained by looking at the contract as a whole and giving effect so far as possible to every part of it".

[25] In this case, the 2nd and 7th appellants representing the family branches of Richard Hoh and Derek Hoh respectively, were removed from the board of directors in 1998. This resulted in a petition being filed in court on 25 October 2000. After ten years of litigation and a court assisted mediation, the family members agreed to bury the hatchet and settled the case by way of the settlement agreement reached and executed by all parties on 9 December 2010. The settlement agreement was to put an end to the family dispute on representation and it would be inconceivable to have cl. 1.9 inserted in the settlement agreement just to provide for "eligibility" only, leaving it as a festering sore waiting to re-open old wounds.

[26] At the expense of repetition, given the background scenario that led to the execution of the settlement agreement it would have been highly unlikely that the objective of cl. 1.9 was merely to provide for the eligibility requirement. The court holds that the primary purpose of cl. 1.9 was to ensure that each of the five branches of the family would be represented on the board of directors of the company thereby settling the family dispute and the pending legal proceedings. If cl. 1.9 is to be construed simplistically as an eligibility clause it would not only amount to being superfluous to articles 3 and 78 but would also amount to mere semantics in that there would be no assurance at all that each of the five branches of the family would be represented on the board of directors since there would be no constraints on the shareholders to vote as they pleased.

[27] The court agrees with counsel for the respondent that it would make no commercial or business sense to interpret cl. 1.9 in such a manner.

[28] As the respondent satisfies the criteria for eligibility under arts. 3 and 78, indeed the respondent is the only person who can represent the late Robert Hoh's branch of the family. There is no alternative person eligible as the respondent's son Hoh Zhi Cern cannot be elected as a director as he does not hold any ordinary shares in the company.

A *Issue 2 – Whether The Learned Judge Was Correct In Granting The Order When Not All Parties To The Settlement Agreement Were Cited As Defendants In The Action*

[29] One of the grounds of appeal by the appellants is that the
B learned judge erred in granting the declaration when not all the parties to the settlement agreement namely, George Hoh, Maureen Hoh Yuet Ming, Hoh Han Lyam and Rohandaren Holdings Sdn Bhd, being the other shareholders of the company were cited as defendants in the action.

C **[30]** The court is of the view that there was no error on the part of the learned judge. It was not necessary for the respondent to have added these shareholders as defendants as they did not breach the terms of the settlement agreement. At the AGM,
D George Hoh and Maureen Hoh did in fact vote in favour of the re-election of the respondent as a director. Hoh Han Lyam was absent at the AGM and did not vote and Rohanderan Holdings Sdn Bhd is no longer a shareholder of the company. Hence the respondent did not have a cause of action against any of these
E four shareholders.

[31] Pursuant to s. 41 of the Specific Relief Act 1950, the respondent could not have commenced a suit against these four shareholders as they did not "deny" the respondent of his right to be re-elected. Two in fact voted in favour, one was absent and
F the fourth was no longer a shareholder at the time of filing of this action.

[32] In any event the order of the court would not be binding on these shareholders as they were not parties to the suit
G pursuant to s. 42 of the Specific Relief Act 1950.

Issue 3 – Whether With The Removal Of The Respondent As A Director Of The Company, The Company Was In Breach Of s. 122(1) Of The Companies Act 1965 In That The Company Did Not Have At Least
H *Two Directors Who Each Has His Principal Or Only Place Of Residence In Malaysia*

[33] At the AGM held on 12 July 2011, four directors were elected on to the Board of Directors namely George Hoh, Frank Hoh (the 1st appellant), Jonathan Hoh (the 4th appellant)
I and Leonard Hoh (the 10th appellant). The respondent contended that with his non re-election as a director, the company did not

have as at 12 July 2011, at least two directors whose "principal or only place of residence" is in Malaysia in compliance with s. 122(1) of the Companies Act 1965. It is not disputed that Jonathan Hoh and Leonard Hoh, the directors nominated and elected to represent the family branches of Derek Hoh and Richard Hoh respectively, do not reside in Malaysia as their principal place of residence is in Australia. It is also not disputed that George Hoh has his principal residence in Malaysia. However, what is in dispute and hotly contested is the principal residence of Frank Hoh (the 1st appellant). The learned judge found that Frank Hoh's principal place of residence was not in Malaysia but in Australia and consequently the company was in breach of s. 122(1) of the Companies Act 1965. It would follow therefore that the resolutions passed at the AGM are null and void and that pursuant to s. 122(6) of the Companies Act 1965 the removal of the respondent as a director is invalid.

[34] We are of the view that the learned Judge was correct in her finding based on the facts deposed in the affidavits and we have no reason to disturb that finding. We ourselves have gone through the facts and have arrived at a similar finding. The facts which show that Frank Hoh does not have a principal residence in Malaysia are as follows:

(i) Frank Hoh and his family migrated to Australia in the 1980s and live permanently in Melbourne;

(ii) Frank Hoh is a citizen of Australia and is a registered voter;

(iii) Frank Hoh when he visits Malaysia would either stay with George Hoh or in hotels, the expenses for which would be met by the company. Frank Hoh stayed at the Hilton Hotel when he came to Kuala Lumpur to attend a director's meeting on 15 June 2011, one month before the AGM;

(iv) the purported change of his principal place of residence from Melbourne, Australia to Shah Alam and then to Subang Jaya took place only after the AGM was held on 12 July 2011. Moreover, the Subang Jaya address provided by Frank Hoh is in fact the address of a relative with whom Frank Hoh was staying;

(v) that although Frank Hoh had affirmed that he is a Malaysian citizen and holds a valid Malaysian passport (presumably on a dual citizenship basis) Frank Hoh did not exhibit the relevant pages of his Malaysian passport to show that the periods of time spent in Malaysia (since the issuance of the passport on 14 June 2011) was longer than the periods of time spent in Australia;

(vi) the Form 49 filed by Frank Hoh with the Companies Commission of Malaysia to inform of the purported change of address was only filed on 25 July 2011 that is, about two weeks after the AGM was held.

[35] It is trite that when determining the principal or only place of residence of a person, the court has to consider various factors and the weight to be attached to such factors. The court has to consider the length of time spent at one place, the connection the person has with that place, the frequency of residence, the element of regular occupation (whether past, present or intended for the future, even if intermittent) and some degree of permanency in the occupation of such residence (see *In Re Y (Minors) (Adoption: Jurisdiction)* [1985] 3 All ER 33).

[36] The determination of a person's residence is not an exact science and can only be arrived at upon a perusal of the prevailing factors cumulatively. In *Levene v. Commissioner of Inland Revenue* [1928] AC 217 Lord Cave was of the view that the term resident connotes residence in one place with some degree of continuity and apart from accidental or temporary absences. And in the case of *Williams v. Horsham District Council* [2004] 3 All ER 30 it was held by the English Court of appeal that:

> We think that it is probably impossible to produce a definition of 'main residence' that will provide the appropriate test in all circumstance. Usually, however, a person's main residence will be the dwelling that a reasonable onlooker, with knowledge of the material facts, would regard as that person's home at the material time.

[37] From the given facts, the court is of the view that Frank Hoh spends most of his time living in Australia and when he visits Malaysia he stays either at the home of a relative or in a hotel. Whilst Frank Hoh is a resident of both Australia and Malaysia it is clear that Frank Hoh's principal or main residence is in Australia

and not within Malaysia. Accordingly the learned judge was correct in holding that there was a breach of s. 122(1) of the Companies Act 1965 with the removal of the respondent as a director and that Frank Hoh was not eligible to be elected a director of the company.

Conclusion

[38] The court agrees with counsel for the appellants that the construction and interpretation of a term in a contract is a matter of law and there is no room for discretion to be exercised by the trial judge. However, in this case the construction and interpretation of cl. 1.9 was correctly determined by the learned judge as a matter of law and there was no necessity for any exercise of discretion in the circumstances.

[39] This court finds that the learned judge did not err in law when holding that the appellants had clearly breached cl. 1.9 when it was resolved at the AGM not to re-elect the respondent. Clause 1.9 was correctly interpreted to mean that the respondent, being the only male representative of the family branch of Robert Hoh and who holds shares must be elected as a director of the company.

[40] The learned judge was also correct in law in allowing the declaratory relief sought by the respondent notwithstanding that four of the parties to the settlement agreement were not cited as defendants on the ground that they were not necessary parties to the action.

[41] And that as Frank Hoh did not have his principal place of residence in Malaysia and with the removal of the respondent, the number of directors with a principal place of residence in Malaysia fell below two and the company was thus in breach of s. 122(1) of the Companies Act 1965. Consequently the resolutions passed at the AGM are null and void.

[42] In the result, the appeal is dismissed with costs.